

that it will not issue an opinion letter as defined in §1621.4, the Commission may provide informal advice or guidance to the requestor. An informal letter of advice does not represent the formal position of the Commission and does not commit the Commission to the views expressed therein. Any letter other than those defined in §1621.4 will be considered a letter of advice and may not be relied upon by any employer within the meaning of section 10 of the Portal to Portal Act of 1947, 29 U.S.C. 255.

**§1621.4 Effect of opinions and interpretations of the Commission.**

(a) Section 10 of the Portal to Portal Act of 1947, 29 U.S.C. 255, which applies to the Equal Pay Act of 1963, 29 U.S.C. 206(d), provides that:

In any action or proceeding based on any act or omission on or after the date of the enactment of this Act, no employer shall be subject to any liability or punishment \* \* \* if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval or interpretation \* \* \* or any administrative practice or enforcement policy of [the Commission].

The Commission has determined that only the following documents may be relied upon by any employer as a "ruling, approval or interpretation" or as "evidence of any administrative practice or enforcement policy" of the Commission within the meaning of the statutory provisions quoted above.

(1) A written document, entitled "opinion letter," signed by the Legal Counsel on behalf of and as approved by the Commission;

(2) A written document issued in the conduct of litigation, entitled "opinion letter," signed by the General Counsel on behalf of and as approved by the Commission;

(3) A matter published and specifically designated as such in the FEDERAL REGISTER.

(b) An opinion letter issued pursuant to paragraph (a)(1) or (a)(2) of this section, when issued to a specific addressee, has no effect upon circumstances beyond the situation of the specific addressee.

**PART 1625—AGE DISCRIMINATION IN EMPLOYMENT ACT**

**Subpart A—Interpretations**

Sec.

1625.1 Definitions.

1625.2 Discrimination between individuals protected by the Act.

1625.3 Employment agency.

1625.4 Help wanted notices or advertisements.

1625.5 Employment applications.

1625.6 Bona fide occupational qualifications.

1625.7 Differentiations based on reasonable factors other than age.

1625.8 Bona fide seniority systems.

1625.9 Prohibition of involuntary retirement.

1625.10 Costs and benefits under employee benefit plans.

1625.11 Exemption for employees serving under a contract of unlimited tenure.

1625.12 Exemption for bona fide executive or high policymaking employees.

**Subpart B—Substantive Regulations**

1625.21 Apprenticeship programs.

AUTHORITY: 81 Stat. 602; 29 U.S.C. 621, 5 U.S.C. 301, Secretary's Order No. 10-68; Secretary's Order No. 11-68; sec. 12, 29 U.S.C. 631, Pub. L. 99-592, 100 Stat. 3342; sec. 2, Reorg. Plan No. 1 of 1978, 43 FR 19807.

SOURCE: 46 FR 47726, Sept. 29, 1981, unless otherwise noted.

**Subpart A—Interpretations**

**§1625.1 Definitions.**

The Equal Employment Opportunity Commission is hereinafter referred to as the *Commission*. The terms *person*, *employer*, *employment agency*, *labor organization*, and *employee* shall have the meanings set forth in section 11 of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. 621 *et seq.*, hereinafter referred to as the *Act*. References to *employers* in this part state principles that are applicable not only to employers but also to labor organizations and to employment agencies.

**§1625.2 Discrimination between individuals protected by the Act.**

(a) It is unlawful in situations where this Act applies, for an employer to discriminate in hiring or in any other way by giving preference because of age between individuals 40 and over.

Thus, if two people apply for the same position, and one is 42 and the other 52, the employer may not lawfully turn down either one on the basis of age, but must make such decision on the basis of some other factor.

(b) The extension of additional benefits, such as increased severance pay, to older employees within the protected group may be lawful if an employer has a reasonable basis to conclude that those benefits will counteract problems related to age discrimination. The extension of those additional benefits may not be used as a means to accomplish practices otherwise prohibited by the Act.

[46 FR 47726, Sept. 29, 1981, as amended at 53 FR 5972, Feb. 29, 1988]

**§ 1625.3 Employment agency.**

(a) As long as an employment agency regularly procures employees for at least one covered employer, it qualifies under section 11(c) of the Act as an employment agency with respect to all of its activities whether or not such activities are for employers covered by the act.

(b) The prohibitions of section 4(b) of the Act apply not only to the referral activities of a covered employment agency but also to the agency's own employment practices, regardless of the number of employees the agency may have.

**§ 1625.4 Help wanted notices or advertisements.**

(a) When help wanted notices or advertisements contain terms and phrases such as *age 25 to 35*, *young*, *college student*, *recent college graduate*, *boy*, *girl*, or others of a similar nature, such a term or phrase deters the employment of older persons and is a violation of the Act, unless one of the exceptions applies. Such phrases as *age 40 to 50*, *age over 65*, *retired person*, or *supplement your pension* discriminate against others within the protected group and, therefore, are prohibited unless one of the exceptions applies.

(b) The use of the phrase *state age* in help wanted notices or advertisements is not, in itself, a violation of the Act. But because the request that an applicant state his age may tend to deter older applicants or otherwise indicate

discrimination based on age, employment notices or advertisements which include the phrase "state age," or any similar term, will be closely scrutinized to assure that the request is for a lawful purpose.

**§ 1625.5 Employment applications.**

A request on the part of an employer for information such as "Date of Birth" or "State Age" on an employment application form is not, in itself, a violation of the Act. But because the request that an applicant state his age may tend to deter older applicants or otherwise indicate discrimination based on age, employment application forms which request such information will be closely scrutinized to assure that the request is for a permissible purpose and not for purposes proscribed by the Act. That the purpose is not one proscribed by the statute should be made known to the applicant, either by a reference on the application form to the statutory prohibition in language to the following effect:

The Age Discrimination in Employment Act of 1967 prohibits discrimination on the basis of age with respect to individuals who are at least 40 years of age," or by other means. The term "employment applications," refers to all written inquiries about employment or applications for employment or promotion including, but not limited to, résumés or other summaries of the applicant's background. It relates not only to written preemployment inquiries, but to inquiries by employees concerning terms, conditions, or privileges of employment as specified in section 4 of the Act.

[46 FR 47726, Sept. 29, 1981, as amended at 53 FR 5972, Feb. 29, 1988]

**§ 1625.6 Bona fide occupational qualifications.**

(a) Whether occupational qualifications will be deemed to be "bona fide" to a specific job and "reasonably necessary to the normal operation of the particular business," will be determined on the basis of all the pertinent facts surrounding each particular situation. It is anticipated that this concept of a bona fide occupational qualification will have limited scope and application. Further, as this is an exception to the Act it must be narrowly construed.

(b) An employer asserting a BFOQ defense has the burden of proving that (1) the age limit is reasonably necessary to the essence of the business, and either (2) that all or substantially all individuals excluded from the job involved are in fact disqualified, or (3) that some of the individuals so excluded possess a disqualifying trait that cannot be ascertained except by reference to age. If the employer's objective in asserting a BFOQ is the goal of public safety, the employer must prove that the challenged practice does indeed effectuate that goal and that there is no acceptable alternative which would better advance it or equally advance it with less discriminatory impact.

(c) Many State and local governments have enacted laws or administrative regulations which limit employment opportunities based on age. Unless these laws meet the standards for the establishment of a valid bona fide occupational qualification under section 4(f)(1) of the Act, they will be considered in conflict with and effectively superseded by the ADEA.

#### **§ 1625.7 Differentiations based on reasonable factors other than age.**

(a) Section 4(f)(1) of the Act provides that

\*\*\* it shall not be unlawful for an employer, employment agency, or labor organization \*\*\* to take any action otherwise prohibited under paragraphs (a), (b), (c), or (e) of this section \*\*\* where the differentiation is based on reasonable factors other than age \*\*\*.

(b) No precise and unequivocal determination can be made as to the scope of the phrase "differentiation based on reasonable factors other than age." Whether such differentiations exist must be decided on the basis of all the particular facts and circumstances surrounding each individual situation.

(c) When an employment practice uses age as a limiting criterion, the defense that the practice is justified by a reasonable factor other than age is unavailable.

(d) When an employment practice, including a test, is claimed as a basis for different treatment of employees or applicants for employment on the grounds that it is a "factor other than"

age, and such a practice has an adverse impact on individuals within the protected age group, it can only be justified as a business necessity. Tests which are asserted as "reasonable factors other than age" will be scrutinized in accordance with the standards set forth at part 1607 of this title.

(e) When the exception of "a reasonable factor other than age" is raised against an individual claim of discriminatory treatment, the employer bears the burden of showing that the "reasonable factor other than age" exists factually.

(f) A differentiation based on the average cost of employing older employees as a group is unlawful except with respect to employee benefit plans which qualify for the section 4(f)(2) exception to the Act.

#### **§ 1625.8 Bona fide seniority systems.**

Section 4(f)(2) of the Act provides that

\*\*\* It shall not be unlawful for an employer, employment agency, or labor organization \*\*\* to observe the terms of a bona fide seniority system \*\*\* which is not a subterfuge to evade the purposes of this Act except that no such seniority system \*\*\* shall require or permit the involuntary retirement of any individual specified by section 12(a) of this Act because of the age of such individual. \*\*\*

(a) Though a seniority system may be qualified by such factors as merit, capacity, or ability, any bona fide seniority system must be based on length of service as the primary criterion for the equitable allocation of available employment opportunities and prerogatives among younger and older workers.

(b) Adoption of a purported seniority system which gives those with longer service lesser rights, and results in discharge or less favored treatment to those within the protection of the Act, may, depending upon the circumstances, be a "subterfuge to evade the purposes" of the Act.

(c) Unless the essential terms and conditions of an alleged seniority system have been communicated to the affected employees and can be shown to be applied uniformly to all of those affected, regardless of age, it will not be

considered a bona fide seniority system within the meaning of the Act.

(d) It should be noted that seniority systems which segregate, classify, or otherwise discriminate against individuals on the basis of race, color, religion, sex, or national origin, are prohibited under title VII of the Civil Rights Act of 1964, where that Act otherwise applies. The "bona fides" of such a system will be closely scrutinized to ensure that such a system is, in fact, bona fide under the ADEA.

[53 FR 15673, May 3, 1988]

**§ 1625.9 Prohibition of involuntary retirement.**

(a)(1) As originally enacted in 1967, section 4(f)(2) of the Act provided:

It shall not be unlawful \* \* \* to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this Act, except that no such employee benefit plan shall excuse the failure to hire any individual \* \* \*.

The Department of Labor interpreted the provision as "Authoriz[ing] involuntary retirement irrespective of age: *Provided*, That such retirement is pursuant to the terms of a retirement or pension plan meeting the requirements of section 4(f)(2)." See 34 FR 9709 (June 21, 1969). The Department took the position that in order to meet the requirements of section 4(f)(2), the involuntary retirement provision had to be (i) contained in a bona fide pension or retirement plan, (ii) required by the terms of the plan and not optional, and (iii) essential to the plan's economic survival or to some other legitimate business purpose—i.e., the provision was not in the plan as the result of arbitrary discrimination on the basis of age.

(2) As revised by the 1978 amendments, section 4(f)(2) was amended by adding the following clause at the end:

and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 12(a) of this Act because of the age of such individual \* \* \*.

The Conference Committee Report expressly states that this amendment is intended "to make absolutely clear one

of the original purposes of this provision, namely, that the exception does not authorize an employer to require or permit involuntary retirement of an employee within the protected age group on account of age" (H.R. Rept. No. 95-950, p. 8).

(b)(1) The amendment applies to all new and existing seniority systems and employee benefit plans. Accordingly, any system or plan provision requiring or permitting involuntary retirement is unlawful, regardless of whether the provision antedates the 1967 Act or the 1978 amendments.

(2) Where lawsuits pending on the date of enactment (April 6, 1978) or filed thereafter challenge involuntary retirements which occurred either before or after that date, the amendment applies.

(c)(1) The amendment protects all individuals covered by section 12(a) of the Act. Section 12(a) was amended in October of 1986 by the Age Discrimination in Employment Amendments of 1986, Pub. L. 99-592, 100 Stat. 3342 (1986), which removed the age 70 limit. Section 12(a) provides that the Act's prohibitions shall be limited to individuals who are at least forty years of age. Accordingly, unless a specific exemption applies, an employer can no longer force retirement or otherwise discriminate on the basis of age against an individual because (s)he is 70 or older.

(2) The amendment to section 12(a) of the Act became effective on January 1, 1987, except with respect to any employee subject to a collective bargaining agreement containing a provision that would be superseded by such amendment that was in effect on June 30, 1986, and which terminates after January 1, 1987. In that case, the amendment is effective on the termination of the agreement or January 1, 1990, whichever comes first.

(d) Neither section 4(f)(2) nor any other provision of the Act makes it unlawful for a plan to permit individuals to elect early retirement at a specified age at their own option. Nor is it unlawful for a plan to require early retirement for reasons other than age.

[46 FR 47726, Sept. 29, 1981, as amended at 52 FR 23811, June 25, 1987; 53 FR 5973, Feb. 29, 1988]

**§ 1625.10 Costs and benefits under employee benefit plans.**

(a)(1) *General.* Section 4(f)(2) of the Act provides that it is not unlawful for an employer, employment agency, or labor organization

to observe the terms of \* \* \* any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this Act, except that no such employee benefit plan shall excuse the failure to hire any individual, and no such \* \* \* employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 12(a) of this Act because of the age of such individuals.

The legislative history of this provision indicates that its purpose is to permit age-based reductions in employee benefit plans where such reductions are justified by significant cost considerations. Accordingly, section 4(f)(2) does not apply, for example, to paid vacations and uninsured paid sick leave, since reductions in these benefits would not be justified by significant cost considerations. Where employee benefit plans do meet the criteria in section 4(f)(2), benefit levels for older workers may be reduced to the extent necessary to achieve approximate equivalency in cost for older and younger workers. A benefit plan will be considered in compliance with the statute where the actual amount of payment made, or cost incurred, in behalf of an older worker is equal to that made or incurred in behalf of a younger worker, even though the older worker may thereby receive a lesser amount of benefits or insurance coverage. Since section 4(f)(2) is an exception from the general non-discrimination provisions of the Act, the burden is on the one seeking to invoke the exception to show that every element has been clearly and unmistakably met. The exception must be narrowly construed. The following sections explain three key elements of the exception:

- (i) What a "bona fide employee benefit plan" is;
- (ii) What it means to "observe the terms" of such a plan; and
- (iii) What kind of plan, or plan provision, would be considered "a subterfuge to evade the purposes of [the] Act."

There is also a discussion of the application of the general rules governing all plans with respect to specific kinds of employee benefit plans.

(2) *Relation of section 4(f)(2) to sections 4(a), 4(b) and 4(c).* Sections 4(a), 4(b) and 4(c) prohibit specified acts of discrimination on the basis of age. Section 4(a) in particular makes it unlawful for an employer to "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age \* \* \*." Section 4(f)(2) is an exception to this general prohibition. Where an employer under an employee benefit plan provides the same level of benefits to older workers as to younger workers, there is no violation of section 4(a), and accordingly the practice does not have to be justified under section 4(f)(2).

(b) *Bona fide employee benefit plan.* Section 4(f)(2) applies only to bona fide employee benefit plans. A plan is considered "bona fide" if its terms (including cessation of contributions or accruals in the case of retirement income plans) have been accurately described in writing to all employees and if it actually provides the benefits in accordance with the terms of the plan. Notifying employees promptly of the provisions and changes in an employee benefit plan is essential if they are to know how the plan affects them. For these purposes, it would be sufficient under the ADEA for employers to follow the disclosure requirements of ERISA and the regulations thereunder. The plan must actually provide the benefits its provisions describe, since otherwise the notification of the provisions to employees is misleading and inaccurate. An "employee benefit plan" is a plan, such as a retirement, pension, or insurance plan, which provides employees with what are frequently referred to as "fringe benefits." The term does not refer to wages or salary in cash; neither section 4(f)(2) nor any other section of the Act excuses the payment of lower wages or salary to older employees on account of age. Whether or not any particular employee benefit plan may lawfully provide lower benefits to older employees on account of age depends on whether all of the elements of

the exception have been met. An “employee-pay-all” employee benefit plan is one of the “terms, conditions, or privileges of employment” with respect to which discrimination on the basis of age is forbidden under section 4(a)(1). In such a plan, benefits for older workers may be reduced only to the extent and according to the same principles as apply to other plans under section 4(f)(2).

(c) *“To observe the terms” of a plan.* In order for a bona fide employee benefit plan which provides lower benefits to older employees on account of age to be within the section 4(f)(2) exception, the lower benefits must be provided in “observ[ance of] the terms of” the plan. As this statutory text makes clear, the section 4(f)(2) exception is limited to otherwise discriminatory actions which are actually prescribed by the terms of a bona fide employee benefit plan. Where the employer, employment agency, or labor organization is not required by the express provisions of the plan to provide lesser benefits to older workers, section 4(f)(2) does not apply. Important purposes are served by this requirement. Where a discriminatory policy is an express term of a benefit plan, employees presumably have some opportunity to know of the policy and to plan (or protest) accordingly. Moreover, the requirement that the discrimination actually be prescribed by a plan assures that the particular plan provision will be equally applied to all employees of the same age. Where a discriminatory provision is an optional term of the plan, it permits individual, discretionary acts of discrimination, which do not fall within the section 4(f)(2) exception.

(d) *Subterfuge.* In order for a bona fide employee benefit plan which prescribes lower benefits for older employees on account of age to be within the section 4(f)(2) exception, it must not be “a subterfuge to evade the purposes of [the] Act.” In general, a plan or plan provision which prescribes lower benefits for older employees on account of age is not a “subterfuge” within the meaning of section 4(f)(2), provided that the lower level of benefits is justified by age-related cost considerations. (The only exception to this general rule is with respect to certain retirement

plans. See paragraph (f)(4) of this section.) There are certain other requirements that must be met in order for a plan not to be a subterfuge. These requirements are set forth below.

(1) *Cost data—general.* Cost data used in justification of a benefit plan which provides lower benefits to older employees on account of age must be valid and reasonable. This standard is met where an employer has cost data which show the actual cost to it of providing the particular benefit (or benefits) in question over a representative period of years. An employer may rely in cost data for its own employees over such a period, or on cost data for a larger group of similarly situated employees. Sometimes, as a result of experience rating or other causes, an employer incurs costs that differ significantly from costs for a group of similarly situated employees. Such an employer may not rely on cost data for the similarly situated employees where such reliance would result in significantly lower benefits for its own older employees. Where reliable cost information is not available, reasonable projections made from existing cost data meeting the standards set forth above will be considered acceptable.

(2) *Cost data—Individual benefit basis and “benefit package” basis.* Cost comparisons and adjustments under section 4(f)(2) must be made on a benefit-by-benefit basis or on a “benefit package” basis, as described below.

(i) *Benefit-by-benefit basis.* Adjustments made on a benefit-by-benefit basis must be made in the amount or level of a specific form of benefit for a specific event or contingency. For example, higher group term life insurance costs for older workers would justify a corresponding reduction in the amount of group term life insurance coverage for older workers, on the basis of age. However, a benefit-by-benefit approach would not justify the substitution of one form of benefit for another, even though both forms of benefit are designed for the same contingency, such as death. See paragraph (f)(1) of this section.

(ii) *“Benefit package” basis.* As an alternative to the benefit-by-benefit basis, cost comparisons and adjustments under section 4(f)(2) may be

made on a limited “benefit package” basis. Under this approach, subject to the limitations described below, cost comparisons and adjustments can be made with respect to section 4(f)(2) plans in the aggregate. This alternative basis provides greater flexibility than a benefit-by-benefit basis in order to carry out the declared statutory purpose “to help employers and workers find ways of meeting problems arising from the impact of age on employment.” A “benefit package” approach is an alternative approach consistent with this purpose and with the general purpose of section 4(f)(2) only if it is not used to reduce the cost to the employer or the favorability to the employees of overall employee benefits for older employees. A “benefit package” approach used for either of these purposes would be a subterfuge to evade the purposes of the Act. In order to assure that such a “benefit package” approach is not abused and is consistent with the legislative intent, it is subject to the limitations described in paragraph (f), which also includes a general example.

(3) *Cost data—five year maximum basis.* Cost comparisons and adjustments under section 4(f)(2) may be made on the basis of age brackets of up to 5 years. Thus a particular benefit may be reduced for employees of any age within the protected age group by an amount no greater than that which could be justified by the additional cost to provide them with the same level of the benefit as younger employees within a specified five-year age group immediately preceding theirs. For example, where an employer chooses to provide unreduced group term life insurance benefits until age 60, benefits for employees who are between 60 and 65 years of age may be reduced only to the extent necessary to achieve approximate equivalency in costs with employees who are 55 to 60 years old. Similarly, any reductions in benefit levels for 65 to 70 year old employees cannot exceed an amount which is proportional to the additional costs for their coverage over 60 to 65 year old employees.

(4) *Employee contributions in support of employee benefit plans—(i) As a condition of employment.* An older employee with-

in the protected age group may not be required as a condition of employment to make greater contributions than a younger employee in support of an employee benefit plan. Such a requirement would be in effect a mandatory reduction in take-home pay, which is never authorized by section 4(f)(2), and would impose an impediment to employment in violation of the specific restrictions in section 4(f)(2).

(ii) *As a condition of participation in a voluntary employee benefit plan.* An older employee within the protected age group may be required as a condition of participation in a voluntary employee benefit plan to make a greater contribution than a younger employee only if the older employee is not thereby required to bear a greater proportion of the total premium cost (employer-paid and employee-paid) than the younger employee. Otherwise the requirement would discriminate against the older employee by making compensation in the form of an employer contribution available on less favorable terms than for the younger employee and denying that compensation altogether to an older employee unwilling or unable to meet the less favorable terms. Such discrimination is not authorized by section 4(f)(2). This principle applies to three different contribution arrangements as follows:

(A) *Employee-pay-all plans.* Older employees, like younger employees, may be required to contribute as a condition of participation up to the full premium cost for their age.

(B) *Non-contributory (“employer-pay-all”) plans.* Where younger employees are not required to contribute any portion of the total premium cost, older employees may not be required to contribute any portion.

(C) *Contributory plans.* In these plans employers and participating employees share the premium cost. The required contributions of participants may increase with age so long as the *proportion* of the total premium required to be paid by the participants does not increase with age.

(iii) *As an option in order to receive an unreduced benefit.* An older employee may be given the option, as an individual, to make the additional contribution necessary to receive the same

level of benefits as a younger employee (provided that the contemplated reduction in benefits is otherwise justified by section 4(f)(2)).

(5) *Forfeiture clauses.* Clauses in employee benefit plans which state that litigation or participation in any manner in a formal proceeding by an employee will result in the forfeiture of his rights are unlawful insofar as they may be applied to those who seek redress under the Act. This is by reason of section 4(d) which provides that it is unlawful for an employer, employment agency, or labor organization to discriminate against any individual because such individual “has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this Act.”

(6) *Refusal to hire clauses.* Any provision of an employee benefit plan which requires or permits the refusal to hire an individual specified in section 12(a) of the Act on the basis of age is a subterfuge to evade the purposes of the Act and cannot be excused under section 4(f)(2).

(7) *Involuntary retirement clauses.* Any provision of an employee benefit plan which requires or permits the involuntary retirement of any individual specified in section 12(a) of the Act on the basis of age is a subterfuge to evade the purpose of the Act and cannot be excused under section 4(f)(2).

(e) *Benefits provided by the Government.* An employer does not violate the Act by permitting certain benefits to be provided by the Government, even though the availability of such benefits may be based on age. For example, it is not necessary for an employer to provide health benefits which are otherwise provided to certain employees by Medicare. However, the availability of benefits from the Government will not justify a reduction in employer-provided benefits if the result is that, taking the employer-provided and Government-provided benefits together, an older employee is entitled to a lesser benefit of any type (including coverage for family and/or dependents) than a similarly situated younger employee. For example, the availability of certain benefits to an older employee under Medicare will not justify denying

an older employee a benefit which is provided to younger employees and is not provided to the older employee by Medicare.

(f) *Application of section 4(f)(2) to various employee benefit plans—(1) Benefit-by-benefit approach.* This portion of the interpretation discusses how a benefit-by-benefit approach would apply to four of the most common types of employee benefit plans.

(i) *Life insurance.* It is not uncommon for life insurance coverage to remain constant until a specified age, frequently 65, and then be reduced. This practice will not violate the Act (even if reductions start before age 65), provided that the reduction for an employee of a particular age is no greater than is justified by the increased cost of coverage for that employee’s specific age bracket encompassing no more than five years. It should be noted that a total denial of life insurance, on the basis of age, would not be justified under a benefit-by-benefit analysis. However, it is not unlawful for life insurance coverage to cease upon separation from service.

(ii) *Long-term disability.* Under a benefit-by-benefit approach, where employees who are disabled at younger ages are entitled to long-term disability benefits, there is no cost-based justification for denying such benefits altogether, on the basis of age, to employees who are disabled at older ages. It is not unlawful to cut off long-term disability benefits and coverage on the basis of some non-age factor, such as recovery from disability. Reductions on the basis of age in the level or duration of benefits available for disability are justifiable only on the basis of age-related cost considerations as set forth elsewhere in this section. An employer which provides long-term disability coverage to all employees may avoid any increases in the cost to it that such coverage for older employees would entail by reducing the level of benefits available to older employees. An employer may also avoid such cost increases by reducing the duration of benefits available to employees who become disabled at older ages, without reducing the level of benefits. In this connection, the Department would not assert a violation where the level of



benefits is not reduced and the duration of benefits is reduced in the following manner:

(A) With respect to disabilities which occur at age 60 or less, benefits cease at age 65.

(B) With respect to disabilities which occur after age 60, benefits cease 5 years after disablement. Cost data may be produced to support other patterns of reduction as well.

(iii) *Retirement plans*—(A) *Participation*. No employee hired prior to normal retirement age may be excluded from a defined contribution plan. With respect to defined benefit plans not subject to the Employee Retirement Income Security Act (ERISA), Pub. L. 93-406, 29 U.S.C. 1001, 1003 (a) and (b), an employee hired at an age more than 5 years prior to normal retirement age may not be excluded from such a plan unless the exclusion is justifiable on the basis of cost considerations as set forth elsewhere in this section. With respect to defined benefit plans subject to ERISA, such an exclusion would be unlawful in any case. An employee hired less than 5 years prior to normal retirement age may be excluded from a defined benefit plan, regardless of whether or not the plan is covered by ERISA. Similarly, any employee hired after normal retirement age may be excluded from a defined benefit plan.

(2) *“Benefit package” approach*. A “benefit package” approach to compliance under section 4(f)(2) offers greater flexibility than a benefit-by-benefit approach by permitting deviations from a benefit-by-benefit approach so long as the overall result is no lesser cost to the employer *and* no less favorable benefits for employees. As previously noted, in order to assure that such an approach is used for the benefit of older workers and not to their detriment, and is otherwise consistent with the legislative intent, it is subject to limitations as set forth below:

(i) A benefit package approach shall apply only to employee benefit plans which fall within section 4(f)(2).

(ii) A benefit package approach shall not apply to a retirement or pension plan. The 1978 legislative history sets forth specific and comprehensive rules governing such plans, which have been adopted above. These rules are not tied

to actuarially significant cost considerations but are intended to deal with the special funding arrangements of retirement or pension plans. Variations from these special rules are therefore not justified by variations from the cost-based benefit-by-benefit approach in other benefit plans, nor may variations from the special rules governing pension and retirement plans justify variations from the benefit-by-benefit approach in other benefit plans.

(iii) A benefit package approach shall not be used to justify reductions in health benefits greater than would be justified under a benefit-by-benefit approach. Such benefits appear to be of particular importance to older workers in meeting “problems arising from the impact of age” and were of particular concern to Congress. Therefore, the “benefit package” approach may not be used to reduce health insurance benefits by more than is warranted by the increase in the cost to the employer of those benefits alone. Any greater reduction would be a subterfuge to evade the purpose of the Act.

(iv) A benefit reduction greater than would be justified under a benefit-by-benefit approach must be offset by another benefit available to the same employees. No employees may be deprived because of age of one benefit without an offsetting benefit being made available to them.

(v) Employers who wish to justify benefit reductions under a benefit package approach must be prepared to produce data to show that those reductions are fully justified. Thus employers must be able to show that deviations from a benefit-by-benefit approach do not result in lesser cost to them or less favorable benefits to their employees. A general example consistent with these limitations may be given. Assume two employee benefit plans, providing Benefit “A” and Benefit “B.” Both plans fall within section 4(f)(2), and neither is a retirement or pension plan subject to special rules. Both benefits are available to all employees. Age-based cost increases would justify a 10% decrease in both benefits on a benefit-by-benefit basis. The affected employees would, however, find it more favorable—that is, more consistent with meeting their

needs—for no reduction to be made in Benefit “A” and a greater reduction to be made in Benefit “B.” This “trade-off” would not result in a reduction in health benefits. The “trade-off” may therefore be made. The details of the “trade-off” depend on data on the relative cost to the employer of the two benefits. If the data show that Benefit “A” and Benefit “B” cost the same, Benefit “B” may be reduced up to 20% if Benefit “A” is unreduced. If the data show that Benefit “A” costs only half as much as Benefit “B”, however, Benefit “B” may be reduced up to only 15% if Benefit “A” is unreduced, since a greater reduction in Benefit “B” would result in an impermissible reduction in total benefit costs.

(g) *Relation of ADEA to State laws.* The ADEA does not preempt State age discrimination in employment laws. However, the failure of the ADEA to preempt such laws does not affect the issue of whether section 514 of the Employee Retirement Income Security Act (ERISA) preempts State laws which related to employee benefit plans.

[44 FR 30658, May 25, 1979, as amended at 52 FR 8448, Mar. 18, 1987. Redesignated and amended at 52 FR 23812, June 25, 1987; 53 FR 5973, Feb. 29, 1988]

**§ 1625.11 Exemption for employees serving under a contract of unlimited tenure.**

(a)(1) Section 12(d) of the Act, added by the 1986 amendments, provides:

Nothing in this Act shall be construed to prohibit compulsory retirement of any employee who has attained 70 years of age, and who is serving under a contract of unlimited tenure (or similar arrangement providing for unlimited tenure) at an institution of higher education (as defined by section 1201(a) of the Higher Education Act of 1965).

(2) This exemption from the Act’s protection of covered individuals took effect on January 1, 1987, and is repealed on December 31, 1993 (see section 6 of the Age Discrimination in Employment Act Amendments of 1986, Pub. L. 99-592, 100 Stat. 3342). The Equal Employment Opportunity Commission is required to enter into an agreement with the National Academy of Sciences, for the conduct of a study to analyze the potential consequences of

the elimination of mandatory retirement on institutions of higher education.

(b) Since section 12(d) is an exemption from the nondiscrimination requirements of the Act, the burden is on the one seeking to invoke the exemption to show that every element has been clearly and unmistakably met. Moreover, as with other exemptions from the ADEA, this exemption must be narrowly construed.

(c) Section 1201(a) of the Higher Education Act of 1965, as amended, and set forth in 20 U.S.C. 1141(a), provides in pertinent part:

The term *institution of higher education* means an educational institution in any State which (1) admits as regular students only persons having a certificate of graduation from a school providing secondary education, or the recognized equivalent of such a certificate, (2) is legally authorized within such State to provide a program of education beyond secondary education, (3) provides an educational program for which it awards a bachelor’s degree or provides not less than a two-year program which is acceptable for full credit toward such a degree, (4) is a public or other nonprofit institution, and (5) is accredited by a nationally recognized accrediting agency or association or, if not so accredited, (A) is an institution with respect to which the Commissioner has determined that there is satisfactory assurance, considering the resources available to the institution, the period of time, if any, during which it has operated, the effort it is making to meet accreditation standards, and the purpose for which this determination is being made, that the institution will meet the accreditation standards of such an agency or association within a reasonable time, or (B) is an institution whose credits are accepted, on transfer, by not less than three institutions which are so accredited, for credit on the same basis as if transferred from an institution so accredited.

The definition encompasses almost all public and private universities and two and four year colleges. The omitted portion of the text of section 1201(a) refers largely on one-year technical schools which generally do not grant tenure to employees but which, if they do, are also eligible to claim the exemption.

(d)(1) Use of the term *any employee* indicates that application of the exemption is not limited to teachers, who are traditional recipients of tenure. The exemption may also be available

with respect to other groups, such as academic deans, scientific researchers, professional librarians and counseling staff, who frequently have tenured status.

(2) The Conference Committee Report on the 1978 amendments expressly states that the exemption does not apply to Federal employees covered by section 15 of the Act (H.R. Rept. No. 95-950, p. 10).

(e)(1) The phrase *unlimited tenure* is not defined in the Act. However, the almost universally accepted definition of academic "tenure" is an arrangement under which certain appointments in an institution of higher education are continued until retirement for age of physical disability, subject to dismissal for adequate cause or under extraordinary circumstances on account of financial exigency or change of institutional program. Adopting that definition, it is evident that the word *unlimited* refers to the duration of tenure. Therefore, a contract (or other similar arrangement) which is limited to a specific term (for example, one year or 10 years) will not meet the requirements of the exemption.

(2) The legislative history shows that Congress intended the exemption to apply only where the minimum rights and privileges traditionally associated with tenure are guaranteed to an employee by contract or similar arrangement. While tenure policies and practices vary greatly from one institution to another, the minimum standards set forth in the 1940 Statement of Principles on Academic Freedom and Tenure, jointly developed by the Association of American Colleges and the American Association of University Professors, have enjoyed widespread adoption or endorsement. The 1940 Statement of Principles on academic tenure provides as follows:

(a) After the expiration of a probationary period, teachers or investigators should have permanent or continuous tenure, and their service should be terminated only for adequate cause, except in the case of retirement for age, or under extraordinary circumstances because of financial exigencies.

In the interpretation of this principle it is understood that the following represents acceptable academic practice:

(1) The precise terms and conditions of every appointment should be stated in writ-

ing and be in the possession of both institution and teacher before the appointment is consummated.

(2) Beginning with appointment to the rank of full-time instructor or a higher rank, the probationary period should not exceed seven years, including within this period full-time service in all institutions of higher education; but subject to the proviso that when, after a term of probationary service of more than three years in one or more institutions, a teacher is called to another institution it may be agreed in writing that his new appointment is for a probationary period of not more than four years, even though thereby the person's total probationary period in the academic profession is extended beyond the normal maximum of seven years. Notice should be given at least one year prior to the expiration of the probationary period if the teacher is not to be continued in service after the expiration of that period.

(3) During the probationary period a teacher should have the academic freedom that all other members of the faculty have.

(4) Termination for cause of a continuous appointment, or the dismissal for cause of a teacher previous to the expiration of a term appointment, should, if possible, be considered by both a faculty committee and the governing board of the institution. In all cases where the facts are in dispute, the accused teacher should be informed before the hearing in writing of the charges against him and should have the opportunity to be heard in his own defense by all bodies that pass judgment upon his case. He should be permitted to have with him an advisor of his own choosing who may act as counsel. There should be a full stenographic record of the hearing available to the parties concerned. In the hearing of charges of incompetence the testimony should include that of teachers and other scholars, either from his own or from other institutions. Teachers on continuous appointment who are dismissed for reasons not involving moral turpitude should receive their salaries for at least a year from the date of notification of dismissal whether or not they are continued in their duties at the institution.

(5) Termination of a continuous appointment because of financial exigency should be demonstrably bona fide.

(3) A contract or similar arrangement which meets the standards in the 1940 Statement of Principles will satisfy the tenure requirements of the exemption. However, a tenure arrangement will not be deemed inadequate solely because it fails to meet these standards in every respect. For example, a tenure plan will not be deemed inadequate solely because it includes a

probationary period somewhat longer than seven years. Of course, the greater the deviation from the standards in the 1940 Statement of Principles, the less likely it is that the employee in question will be deemed subject to "unlimited tenure" within the meaning of the exemption. Whether or not a tenure arrangement is adequate to satisfy the requirements of the exemption must be determined on the basis of the facts of each case.

(f) Employees who are not assured of a continuing appointment either by contract of unlimited tenure or other similar arrangement (such as a State statute) would not, of course, be exempted from the prohibitions against compulsory retirement, even if they perform functions identical to those performed by employees with appropriate tenure.

(g) An employee within the exemption can lawfully be forced to retire on account of age at age 70 (see paragraph (a)(1) of this section). In addition, the employer is free to retain such employees, either in the same position or status or in a different position or status: *Provided*, That the employee voluntarily accepts this new position or status. For example, an employee who falls within the exemption may be offered a nontenured position or part-time employment. An employee who accepts a nontenured position or part-time employment, however, may not be treated any less favorably, on account of age, than any similarly situated younger employee (unless such less favorable treatment is excused by an exception to the Act).

[44 FR 66799, Nov. 21, 1979; 45 FR 43704, June 30, 1980, as amended at 53 FR 5973, Feb. 29, 1988]

**§ 1625.12 Exemption for bona fide executive or high policymaking employees.**

(a) Section 12(c)(1) of the Act, added by the 1978 amendments and as amended in 1984 and 1986, provides:

Nothing in this Act shall be construed to prohibit compulsory retirement of any employee who has attained 65 years of age, and who, for the 2-year period immediately before retirement, is employed in a bona fide executive or higher policymaking position, if such employee is entitled to an immediate

nonforfeitable annual retirement benefit from a pension, profit-sharing, savings, or deferred compensation plan, or any combination of such plans, of the employer of such employee which equals, in the aggregate, at least \$44,000.

(b) Since this provision is an exemption from the non-discrimination requirements of the Act, the burden is on the one seeking to invoke the exemption to show that every element has been clearly and unmistakably met. Moreover, as with other exemptions from the Act, this exemption must be narrowly construed.

(c) An employee within the exemption can lawfully be forced to retire on account of age at age 65 or above. In addition, the employer is free to retain such employees, either in the same position or status or in a different position or status. For example, an employee who falls within the exemption may be offered a position of lesser status or a part-time position. An employee who accepts such a new status or position, however, may not be treated any less favorably, on account of age, than any similarly situated younger employee.

(d)(1) In order for an employee to qualify as a "bona fide executive," the employer must initially show that the employee satisfies the definition of a bona fide executive set forth in § 541.1 of this chapter. Each of the requirements in paragraphs (a) through (e) of § 541.1 must be satisfied, regardless of the level of the employee's salary or compensation.

(2) Even if an employee qualifies as an executive under the definition in § 541.1 of this chapter, the exemption from the ADEA may not be claimed unless the employee also meets the further criteria specified in the Conference Committee Report in the form of examples (see H.R. Rept. No. 95-950, p. 9). The examples are intended to make clear that the exemption does not apply to middle-management employees, no matter how great their retirement income, but only to a very few top level employees who exercise substantial executive authority over a significant number of employees and a large volume of business. As stated in the Conference Report (H.R. Rept. No. 95-950, p. 9):

Typically the head of a significant and substantial local or regional operation of a corporation [or other business organization], such as a major production facility or retail establishment, but not the head of a minor branch, warehouse or retail store, would be covered by the term "bona fide executive." Individuals at higher levels in the corporate organizational structure who possess comparable or greater levels of responsibility and authority as measured by established and recognized criteria would also be covered.

The heads of major departments or divisions of corporations [or other business organizations] are usually located at corporate or regional headquarters. With respect to employees whose duties are associated with corporate headquarters operations, such as finance, marketing, legal, production and manufacturing (or in a corporation organized on a product line basis, the management of product lines), the definition would cover employees who head those divisions.

In a large organization the immediate subordinates of the heads of these divisions sometimes also exercise executive authority, within the meaning of this exemption. The conferees intend the definition to cover such employees if they possess responsibility which is comparable to or greater than that possessed by the head of a significant and substantial local operation who meets the definition.

(e) The phrase "high policymaking position," according to the Conference Report (H.R. Rept. No. 95-950, p. 10), is limited to " \* \* \* certain top level employees who are not 'bona fide executives' \* \* \*." Specifically, these are:

\* \* \* individuals who have little or no line authority but whose position and responsibility are such that they play a significant role in the development of corporate policy and effectively recommend the implementation thereof.

For example, the chief economist or the chief research scientist of a corporation typically has little line authority. His duties would be primarily intellectual as opposed to executive or managerial. His responsibility would be to evaluate significant economic or scientific trends and issues, to develop and recommend policy direction to the top executive officers of the corporation, and he would have a significant impact on the ultimate decision on such policies by virtue of his expertise and direct access to the decisionmakers. Such an employee would meet the definition of a "high policymaking" employee.

On the other hand, as this description makes clear, the support personnel of a "high policymaking" employee would

not be subject to the exemption even if they supervise the development, and draft the recommendation, of various policies submitted by their supervisors.

(f) In order for the exemption to apply to a particular employee, the employee must have been in a "bona fide executive or high policymaking position," as those terms are defined in this section, for the two-year period immediately before retirement. Thus, an employee who holds two or more different positions during the two-year period is subject to the exemption only if each such job is an executive or high policymaking position.

(g) The Conference Committee Report expressly states that the exemption is not applicable to Federal employees covered by section 15 of the Act (H.R. Rept. No. 95-950, p. 10).

(h) The "annual retirement benefit," to which covered employees must be entitled, is the sum of amounts payable during each one-year period from the date on which such benefits first become receivable by the retiree. Once established, the annual period upon which calculations are based may not be changed from year to year.

(i) The annual retirement benefit must be immediately available to the employee to be retired pursuant to the exemption. For purposes of determining compliance, "immediate" means that the payment of plan benefits (in a lump sum or the first of a series of periodic payments) must occur not later than 60 days after the effective date of the retirement in question. The fact that an employee will receive benefits only after expiration of the 60-day period will not preclude his retirement pursuant to the exemption, if the employee could have elected to receive benefits within that period.

(j)(1) The annual retirement benefit must equal, in the aggregate, at least \$44,000. The manner of determining whether this requirement has been satisfied is set forth in § 1627.17(c).

(2) In determining whether the aggregate annual retirement benefit equals at least \$44,000, the only benefits which may be counted are those authorized by and provided under the terms of a pension, profit-sharing, savings, or deferred compensation plan. (Regulations issued pursuant to section 12(c)(2) of

## § 1625.21

the Act, regarding the manner of calculating the amount of qualified retirement benefits for purposes of the exemption, are set forth in §1627.17 of this chapter.)

(k)(1) The annual retirement benefit must be "nonforfeitable." Accordingly, the exemption may not be applied to any employee subject to plan provisions which could cause the cessation of payments to a retiree or result in the reduction of benefits to less than \$44,000 in any one year. For example, where a plan contains a provision under which benefits would be suspended if a retiree engages in litigation against the former employer, or obtains employment with a competitor of the former employer, the retirement benefit will be deemed to be forfeitable. However, retirement benefits will not be deemed forfeitable solely because the benefits are discontinued or suspended for reasons permitted under section 411(a)(3) of the Internal Revenue Code.

(2) An annual retirement benefit will not be deemed forfeitable merely because the minimum statutory benefit level is not guaranteed against the possibility of plan bankruptcy or is subject to benefit restrictions in the event of early termination of the plan in accordance with Treasury Regulation 1.401-4(c). However, as of the effective date of the retirement in question, there must be at least a reasonable expectation that the plan will meet its obligations.

(Sec. 12(c)(1) of the Age Discrimination in Employment Act of 1967, as amended by sec. 802(c)(1) of the Older Americans Act Amendments of 1984, Pub. L. 98-459, 98 Stat. 1792)

[44 FR 66800, Nov. 21, 1979; 45 FR 43704, June 30, 1980, as amended at 50 FR 2544, Jan. 17, 1985; 53 FR 5973, Feb. 29, 1988]

### Subpart B—Substantive Regulations

#### § 1625.21 Apprenticeship programs.

All apprenticeship programs, including those apprenticeship programs created or maintained by joint labor-management organizations, are subject to the prohibitions of sec. 4 of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. 623. Age limitations in apprenticeship programs

## 29 CFR Ch. XIV (7-1-97 Edition)

are valid only if excepted under sec. 4(f)(1) of the Act, 29 U.S.C. 623(f)(1), or exempted by the Commission under sec. 9 of the Act, 29 U.S.C. 628, in accordance with the procedures set forth in 29 CFR 1627.15.

[61 FR 15378, Apr. 8, 1996]

### PART 1626—PROCEDURES—AGE DISCRIMINATION IN EMPLOYMENT ACT

Sec.

1626.1 Purpose.

1626.2 Terms defined in the Age Discrimination in Employment Act of 1967, as amended.

1626.3 Other definitions.

1626.4 Information concerning alleged violations of the Act.

1626.5 Where to submit complaints and charges.

1626.6 Form of charge.

1626.7 Timeliness of charge.

1626.8 Contents of charge; amendment of charge.

1626.9 Referral to and from State agencies; referral States.

1626.10 Agreements with State or local fair employment practices agencies.

1626.11 Notice of charge.

1626.12 Conciliation efforts pursuant to section 7(d) of the Act.

1626.13 Withdrawal of charge.

1626.14 Right to inspect or copy data.

1626.15 Commission enforcement.

1626.16 Subpoenas.

1626.17 Procedure for requesting an opinion letter.

1626.18 Effect of opinions and interpretations of the Commission.

1626.19 Rules to be liberally construed.

AUTHORITY: Sec. 9, 81 Stat. 605, 29 U.S.C. 628; sec. 2, Reorg. Plan No. 1 of 1978, 3 CFR, 1978 Comp., p. 321.

SOURCE: 48 FR 140, Jan. 3, 1983, unless otherwise noted.

#### § 1626.1 Purpose.

The regulations set forth in this part contain the procedures established by the Equal Employment Opportunity Commission for carrying out its responsibilities in the administration and enforcement of the Age Discrimination in Employment Act of 1967, as amended.